NO. 83960-3

SUPREME COURT
OF THE STATE OF WASHINGTON

In re the Marriage of

TERESA FARMER,

Respondent,

and

DANIEL J. FARMER

Petitioner.

SUPPLEMENTAL BRIEF OF RESPONDENT

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I. SUMMARY INTRODUCTION

This case gives the Court the opportunity to affirm Washington's long-standing principle that the victim of a fraudulent conversion of property is entitled to a make-whole remedy for the total loss incurred. This includes where the converted property cannot be replaced or restored. Tort victim Teresa Farmer is entitled to damages for each and every stick in her "bundle of sticks" that were her Paccar stock options which could have been exercised over a seven-year schedule, but for the conversion.

This Court granted Daniel Farmer's petition for review, apparently to address an issue left open in *In re Marriage of Langham & Kolde*, 153 Wn.2d 553, 569, 106 P.3d 212 (2005) ("*Langham II*"),[1] "the issue of measuring damages in conversion actions when the property fluctuates in value, as stock does." It was not addressed in *Langham II* because (1) "the stock . . . declined rapidly in value," *id.;* and (2) the Court did not need to address the future value of converted stock options because the victim in *Langham II* did not discover her options had been exercised until she had already decided to exercise them herself. *See Langham I* at *2.

Thus, *Langham II* involved choosing damages from known values for the converted property. *Farmer* involves calculating damages for the destruction in 2006 of Teresa's future rights to choose, up to 2014, when and how many of her options to exercise, and so obtain future profits.

The core question – whether Judge Churchill chose the correct

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[1] *Langham II* reversed the Court of Appeals decision, *In re Marriage of Langham & Kolde*, 116 Wn.App. 1067, 2003 WL 21055463 (2003) ("*Langham I*"). Since some facts in *Langham* are set forth only in the Court of Appeals decision, it is Appendix F.

measure and amount of damages to make Teresa whole for the taking of ***all*** of her property rights related to the options, ***including*** her future right to choose – is readily answered "yes" when viewed in the full factual and procedural context from which it arose. Teresa was robbed of her right to make choices with her property, choices which had value. Judge Churchill explained why the make-whole remedy was not a windfall: "It's the amount that she had the ability to exercise of her own free will. [Daniel] took her own free will away from her." 6/4/07 RP, p. 30. Judge Churchill's decision reflected and applied what this Court recognized in *Langham II*: "While it is true that family law courts are courts of equity, we fail to see how it is inequitable to make a party pay for the tort he committed." 153 Wn.2d at 569.

II. ISSUES PRESENTED.

A. Where the converted property cannot be restored or replaced, and where that destroyed property includes the right of successive future exercises over seven years which are designed to allow the option holder to obtain and maximize substantial future profits, is the proper measure of damages the traditional "make-whole" remedy that compensates the victim for the entire loss, including lost future profits, or must the victim be forced to receive only the stripped-down value of the property when sold preemptively such that the potential for future profits was destroyed?

B. Must the trial court's determination of damages be affirmed where it is squarely within the only evidence presented as to the future value of damages (as lost profits) by an expert witness and where: 1) the wrongdoer Daniel was heard on his substantive challenge to the basis for that value; 2) the wrongdoer Daniel failed to put in any evidence of a contrary value by his own expert or by himself prior to or at the hearing on damages, despite ample opportunity; and 3) the trial court reduced the final award to present value based on later submissions so that the final award was within the range of credible evidence before the trial court?

III. SUPPLEMENTAL STATEMENT OF THE CASE.

A. Overview.

The full context for calculating damages means knowing the nature of the property destroyed and the injuries sustained which must be compensated, and the tactical litigation choices Daniel made throughout the contentious litigation.[2] In this context, there is no question Judge Churchill neither erred nor abused her discretion in determining Teresa's make-whole damages, and that the Court of Appeals correctly affirmed.

The parties' CR2A Agreement was filed July 21, 2006, three months before final orders (CP 7, ¶¶1-2, App. A. p.A-1) and set out the division of Paccar stock options between them. *See* CP 8, App. A-2. Fifty per cent of the community Paccar stock options belonged to Teresa under the divorce property settlement. *Id.*[3] Teresa's "bundle" of option property rights included the right to determine ***when*** to exercise them and ***how***

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[2] The divorce proceedings began in 2004 and the docket shows 336 filings before final orders were entered on October 13, 2006; the three children then ranged in age from 9 to 16. CP 705. The Court of Appeals decision gives a thorough review of the facts and Teresa's Court of Appeals merits response brief ("COA Response") gives even more.

[3] The options are set out in the Decree, CP 185-86:

Option Date	Type	Granted	Price	Expiration Date	Wife's Share
4/27/1999	NQ	1,710.0	$23.9028	4/27/2009	855 to wife
1/25/2000	NQ	2,029.0	$18.5555	1/25/2010	1014 to wife
1/23/2002	NQ	4027.0	$28.2045	1/23/2012	1510 to wife
1/15/2003	NQ	3513.0	$31.40	1/15/2013	732 to wife
1/15/2004	NQ	1992.0	$56.9533	1/15/2014	83 to wife
1/24/2001	NQ	1,707.0	$22.9445	1/24/2001	854 to wife

many to exercise at any time through the last expiration date in, 2014. *Id.*

Daniel peremptorily exercised ***all*** of Teresa's options less than a month later on August 14, 2006. CP 10 ¶15, App. A-4. He then tried to deceive Teresa, lied to the superior court at the October 13 hearing, then dragged his feet in producing the documentation of what he had done.[4] On October 25, 2006, Daniel's new counsel filed Daniel's affidavit admitting the conversion and a motion stating his proposed "trust fund" remedy, but failed to turn over the documents on his exercise of Teresa's hundreds of thousands of dollars in options that had been ordered on October 13. COA Response, pp.13 – 18. Teresa was forced to bring repeated motions to get the underlying documentation until he was forced to produce them in February, 2007 by multiple contempt orders and fines. *See* CP 8-9, ¶¶ 7-12, App. A-2-3.

B. The April, 2007 Damages Hearing.

The April 2007 hearing addressed the damages for the conversion. Daniel proposed the "trust" arrangement from his earlier motion. Teresa requested a make-whole remedy based on the value of the options if exercised in the future, submitting an expert evaluation from a CPA and certified financial planner and expert in business valuation, Roland

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[4] Daniel ***twice*** tried to get Teresa, after the fact, to "instruct" him to exercise all her options, which she refused (CP 10 ¶¶16-17, App. A-4). At the October 13, 2006 hearing for final orders when Teresa's counsel, based on a subpoena, questioned the new $491,000 deposit into Daniel's bank account, the trial court was told by Daniel's counsel (apparently relying on advice from Daniel) that the funds were only from exercise of Daniel's options and none of Teresa's, which was false. CP 8-9, ¶¶ 5-6, App. A-2-3. There is no evidence the attorney who made the statement knew it was false at the time; that attorney withdrew shortly after the hearing. Judge Churchill ordered those documents produced by October 19, CP 698; CP 9, ¶ 9, which he failed to do.

Nelson. *See* CP 136-143, App. B (Nelson Dec. and CV). Teresa requested specific relief of $643,000. 4/16/07 RP, p. 15:17–p. 16:19 (bold added).[5]

Daniel did not submit an affidavit of anyone to challenge Nelson's expertise. Nor did he seek to depose Nelson; nor did he subpoena Nelson to cross-examine at the hearing. Teresa pointed out below that Daniel was well aware of how to get an expert to rebut one of Teresa's on short notice.[6] Instead, Daniel made a tactical decision to combine his response to Teresa's motion with his written reply in support of his proposed alternative remedy, CP 130:11-21, and press for his trust remedy.

C. Judge Churchill's Rulings.

Judge Churchill's April 16, 2007, ruling adopted the unrebutted damage figure from Teresa in order to provide a make-whole remedy, noting that Daniel could have contested it had he so chosen. 4/16/07 RP 30-33.[7] Daniel moved for reconsideration and raised application of *Langham II* and discounting the damage amount to present value. Teresa's

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5 And he's done an analysis of the historic increase in the value of the Paccar stock over a fairly significant period going backwards. It's a reasonable projection. He's based his projection upon that analysis of this stock. And he has come up with a – a value for what it is that she would have been able to receive had she been able to exercise these stock options on the day before these stock options expired. . . . we are asking the Court to . . . award a judgment for ***the amount of damages which my client has sustained as a direct result of what Mr. Farmer did.***

6 *See* COA Response Brief, pp. 9-11 showing Daniel's one-day response in October, 2006 with his own expert on the issue of the valuation of their Island County home.

7 Well, of course, if you had some concerns about the CPA's analysis, I think that certainly you had the time and perhaps the ability to get another analysis done by - maybe on this point a stock analysis, but that didn't occur. . . . . This is based upon [Daniel Farmer's] actions. No one else's actions but his.

response reiterated the future value element of her loss. CP 100-101 (emphasis added).[8] Judge Churchill stated why she kept the amount of damages based on the future values submitted by Mr. Nelson:

> And there is language in the *Langham* case that leads the Court to believe that – that Mr. Farmer should pay for the tort that he committed. And that – that at least Mrs. Farmer should get the value at the time of the conversion. That "at least" says it could be "more than."
>
> And in this particular case – I mean, the Court is a court of equity. And Mr. Farmer exercised the stock options in August fraudulently. He knew he didn't have the authority to do so. And he continued to hide his actions and lie to this Court and try to finesse Mrs. Farmer into agreeing that they should be sold so that he wouldn't have to disclose what he had done.
>
> Now, is that punitive to take that into account? I don't think so. Because what he was doing was just out-and-out fraud not only to Mrs. Farmer, but also to this Court. He disclosed in October when he really had no other option but to do so.
>
> So I – I thought about this. Is this punitive? Is this making him pay more than he's required to do so?
>
> No. It's making him pay for what he did.
>
> The judgment represents her loss. They -- **she had the ability to exercise the stock options at some point in the future -- not just today -- but at some point in the future. And the only information that I have is what the value of those would be in the future is the expert opinion that was provided to me.**
>
> Now, I thought very long and hard . . . And just -- I kept coming up against the thought of why if – **if we provide that the damages will be on the date of the stock – stock options were exercised, then we are rewarding Mr. Farmer's wrongdoing. We are letting him have his way for something he knew was wrong, but he didn't have the authority to do. . . .**

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[8] ". . . **her loss includes the increased value which she reasonably would have been able to receive had she held the stock options until the day before their expiration. That is the true measure of her loss.** That issue was not before the Supreme Court in the *Langham* case and the *Langham* case said so specifically and unequivocally."

> It's not a windfall. It's the amount that she had the ability to exercise of her own free will. He took her own free will away from her.

6/04/07 RP, pp. 27-30 (emphasis added).

The Court of Appeals affirmed. It held Teresa is entitled to be made whole for all of her property destroyed, not just part, and that Judge Churchill was correct to base the damages on the only evidence on value before her, from Mr. Nelson, whose qualifications were not rebutted.

IV. ARGUMENT.

A. The Measure of Damages Necessary to Make Teresa Whole For The Tort of Fraudulent Conversion of Her Paccar Stock Options, Which Had Exercise Dates Up to 2014, Must Include an Estimate of Future Profits to Compensate For Her Right to Choose When to Exercise the Options.

1. Tort Damages, Stock Options, and Make Whole Damages in Stock Option Conversion Cases.

The measure of damages depends on the nature of the claim, the purpose of the award, and the facts underlying the injury to be remedied or compensated. Conversion of stock options in the context of a marital property settlement is a tort which may be adjudicated by the equity family law court. *Langham II*, 153 Wn.2d at 560. In general, tort damages are "make whole" damages, designed "to repair [the victim's] injury, or to make him whole again as nearly as that may be done by an award of money." *DeNike v. Mowery*, 69 Wn.2d 357, 358, 418 P.2d 1010 (1966). Tort "make-whole" damages cover injuries to property[9] and the total

[9] *Burr v. Clark*, 30 Wn.2d 149, 158, 190 P.2d 769 (1948): "The rule for the measurement of damages for injury to property, generally, is the same as that applicable to torts generally."

destruction of property.[10] When the destruction of the property is caused by the defendant's negligence there is no "windfall" to the injured plaintiff from an award that may leave her in a better position, if that is what is required to repair the injury. *Id.*

A stock option is property that has several "sticks" in its "bundle." *Langham II,* 153 Wn.2d at 564-566. The option is the right to buy a designated stock at a particular price for a specified period of time. *Id., quoting In re Marriage of Harrington*, 85 Wn. App. 613, 624, 935 P.2d 1357 (1997), citing BLACK'S LAW DICTIONARY 986-87 (5th ed. 1979). This right to purchase stock is granted by corporations to employees as a benefit or an incentive. *Id.; see In re Marriage of Short*, 125 Wn.2d 865, 872, 890 P.2d 12 (1995). The grant establishes the purchase price and the date the stock becomes available for purchase.

A central issue in *Langham II* was at what point the options were converted: When they were exercised? Or when the stock received from the exercise was sold, sometimes long after the exercise? In *Langham I,* the Court of Appeals followed "the older approach" as to when stock options are converted and ruled that they are not converted until the resulting stock is sold because only then "is the plaintiff deprived of the right of possession." *Langham II,* 153 Wn.2d at 565. This Court then

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[10] *Puget Power & Light v. Strong*, 117 Wn.2d 400, 403-04, 816 P.2d 716 (1991) (no "windfall" or "unjust enrichment" for victim to get full replacement cost of destroyed property even though the replacement will last longer than the destroyed property, where the property had to be replaced due to the defendant's negligence); *Thompson v. King Feed Nutrition*, 153 Wn.2d 447, 454-457, 105 P.3d 378 (2005) ("lesser than" measure of damages does not apply where the destruction of property was negligent; proper measure of damages is "that which is most beneficial to the injured party").

analyzed the nature of stock options to resolve the case:

> This reasoning confuses stock options with the stock itself. Stock may be converted when it is sold, but stock **options**, as a right to purchase stock, disappear when the owner exercises the options and purchases the stock. Once the owner exercises the options, he has irrevocably exchanged one kind of property (stock options) for another kind of property (stock), **and has lost the ability to enter the stock markets at the time of his choosing.** His "range of elective action" is now limited to retaining the stock or selling it. [citation omitted] The older approach to conversion is misguided when applied to intangible property such as stock options, for if the would-be converter held the stock after exercising another's options, he would not have converted them, and the rightful owner could not sue for payment of their full value.
>
> The modern view of conversion more readily fits the reality that stock options are valuable property and are converted when exercised by limiting the owner's available choices. We hold that some property interest in the allegedly converted goods is all that is needed to support an action in conversion. Margo had a property interest in the stock options and that is enough. Further, we hold that stock options are property and are converted when exercised.

Langham II, 153 Wn.2d at 565-66 (emphasis added).

But while the Court recognized in the bolded language the potentially unique element of damages in stock option conversion cases, that factor did not come into play in calculating damages in *Langham II.* The victim whose options were converted, Margo Langham ("Margo"), did not learn of the conversion until she asked her ex-husband Velle Kolde ("Velle") to exercise all of them in March 2001 and was told she owned fewer than she thought. *Langham I* at *2, App. F-2. Margo sought relief five months later via a judgment against Velle for conversion. *Langham II,* 153 Wn.2d at 558. So, even though *Langham II* is a stock option case and involved the pre-emptive exercise of all of Margo's options, it actually

falls within the standard framework of conversion of stocks or other tangible, saleable property with present cash values, such as the Canadian coins *Brougham v. Swarva* case, because there were clear bases to calculate value for purposes of measuring the loss: the dates that Velle converted all the options between July, 1999 and February, 2000; and the March 1, 2001 date that Margo requested he exercise all of her shares.

Nothing in *Langham II* required a calculation for the destruction of the right to choose the time to exercise the options because Margo's claim arose ***after*** she had already decided she wanted to exercise them all. She therefore did not seek damages for lost future profits because that "stick" was not in her "bundle" that was destroyed. In contrast, it was the stick of choice -- when and how many options to exercise, "the ability to enter the stock markets at the time of [her] choosing" -- that was taken from Teresa Farmer and had to be compensated for her to be made whole.

All the Paccar options at issue had vested by August 2006, otherwise Daniel could not have exercised them. Teresa's bundle thus included the right and the option to choose when to exercise some or all of the options depending on her (and the children's) financial needs and the current position of the market. Since the options did not begin to expire until April 2009, in 2006 Teresa had a long period during which she was supposed to be able to take advantage of market opportunities to maximize the return from the options. It was the "stick" of timing and the second stick of how many to exercise that were taken and ***destroyed*** by Daniel's conversion, since the options, once exercised, could not be restored or

reacquired. *Langham II,* 153 Wn.2d at 565-66. They were gone, as dead as a fatal auto crash victim. Judge Churchill had to determine what was the total value for Teresa's options, for ***all*** the sticks that had been in her bundle, that would make her whole, including estimated future profits?

After the April 2007 hearing, Daniel argued for the measure of damages stated in *Langham II* and other cases such as *Brougham v. Swarva,* 34 Wn. App. 68, 661 P.2d 138 (1983), which talk of valuing the converted property at the time of the conversion or within a reasonable time of the conversion. He renews that argument to this Court. But none of his arguments in the trial court or since have ever focused on, or even arguably provided for, a genuine make-whole remedy that would compensate Teresa for the lost choices he stole, the opportunity to choose when and how many options to exercise between 2006 and 2014.

Judge Churchill recognized the make-whole foundation for tort damages and applied the language in *Langham,* referencing the RESTATEMENT that the aggrieved party is entitled to "*at least* its value at the time of conversion," indicating that the value at the time of conversion was the minimum or "threshold" amount of damages that may be awarded where the value **declines**. *See* 6/04/07 RP, pp. 27-28. However, Daniel ignores the fact that the conversion involved is fraudulent. As referred to in *Langham II,* 153 Wn.2d at 568 & n.9, and argued by Teresa below, the proper measure of damages where fraudulent activity is concerned is described in RESTATEMENT (FIRST) OF RESTITUTION § 151 (1937) (emphasis added) and is not limited:

> Where a person is entitled to a money judgment against another because by fraud, duress or other consciously tortious conduct the other has acquired, retained or disposed of his property, the measure of recovery for the benefit received by the other is the value of the property at the time of its improper acquisition, retention or disposition, ***or a higher value if this is required to avoid injustice*** where the property has fluctuated in value or additions have been made to it.

Teresa has consistently argued that the lost profits from future exercise must be included in her damages to both insure she is made whole and to insure that Daniel does not profit from his misconduct. Lost profits are an accepted avenue of tort recovery. *See*16 DeWolf and Allen, WASHINGTON PRACTICE: TORT LAW AND PRACTICE, § 5.9 (2006). No principled basis is suggested why Teresa should be denied that element of her make-whole remedy. Given the nature of stock options and the long exercise time available to Teresa, inclusion of lost profits from projected future exercises was proper, necessary, and not speculative.

Daniel cited below *Brougham v. Swarva* for the proposition that in valuing property that may have fluctuating value, such as stocks, the measure of damages is at most "the highest value of the property . . . between the time of conversion and a ***reasonable time*** after the victim learns of such conversion," quoting the Second Circuit's "reasonable time" phrase from *In re Salmon Weed Co.*, 53 F.2d 335 (2nd Cir. 1931). But despite the quoted language, nothing in *Brougham* or *Salmon Weed* precludes or conflicts with giving recognition to the potential future lost profits as part of the damage award that is ***determined*** at a "reasonable time" after the conversion. Neither is a stock ***option*** case. The "reasonable time" phrase in *Salmon Weed* had to do with taking into account the

ability of the aggrieved party to mitigate their damages by replacing the sold stock with newly acquired stock (which sort of replacement is impossible for options), and the need to not reward a plaintiff who delayed mitigation. *See* 53 F.2d at 340-341. The Second Circuit's analysis was predicated on the fact the converted item can be replaced or repurchased. But it also states the premise of Judge Churchill's ruling: the goal of damages is "to restore the owner to the position he would have been in but for the conversion." 53 F.2d at 341. It cannot fairly be used to excise the options' time value from Teresa's damages.

As *Langham II* discusses, employee stock options derive much of their value from the holder's option to observe market fluctuations and exercise at a later date with very little risk of loss. Thus, in determining a "make-whole value" of Teresa's options, the court ***had to*** take into account the amount of time Teresa had to observe the fluctuation of the underlying stock price with no obligation to exercise and thus, little or no risk. In short, Teresa's loss ***must*** incorporate the time value associated with the options in order to "avoid an injustice" as is anticipated by the Restatement, while insuring Washington's policy of "make-whole" tort damages is respected. That calculation was made in a "reasonable time."

Judge Churchill's ruling compensating for future profits gives effect to the first premise stated in *Brougham* that "[t]he innocent victim should not suffer a loss because of the wrongful taking and withholding of [her] property." *Brougham, supra*, 34 Wn. App. at 78. Teresa is not getting a windfall. She is getting the present value of ***the whole of*** her

property – the time value and the inherent value – that Daniel took from her. It would have been error to award Teresa only the net inherent value of the stock options as Daniel proposed (some $173,000, CP 121:11) because Teresa then suffers a substantial loss and is not made whole, contrary to longstanding Washington tort law. Judge Churchill's reliance on Mr. Nelson's unrebutted (and the ***only***) value before her for Teresa's ***total*** loss, which included lost profits, therefore must be affirmed.

Daniel contends the damages are "punitive." Judge Churchill did not believe they were. But even assuming an arguably punitive element (which there is not), such so-called punitive damages[11] are recognized in cases of willful conversion with the showing of intentional bad faith or fraud, as this Court held in 1965 in *Smith v. Shiflitt*, 66 Wn.2d 462, 467, 403 P.2d 364 (1965).[12] The rule would apply here ***if*** Judge Churchill had

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[11] In fact, calling such damages punitive is a misnomer. In the willful conversion context such damages, though early in their history were called punitive, are in fact closely tied to the rationale and facts of what constitutes full compensation for the victim. Rather than a blank check for punishing the willful converter as an extra amount beyond the loss, they are the safeguard to insure the victim in fact is fully compensated and the wrongdoer gets no benefit from the misconduct.

[12] "We correctly stated the rule in these cases when, in *Grays Harbor County v. Bay City Lbr. Co., supra*, [47 Wn.2d p. 879, 886, 289 P.2d 975 (1955)] we said:

> Because the rule allowing a higher measure of damages in cases of wilful conversion is in conflict with our frequently expressed policy with regard to punitive damages, it should be strictly limited in its application to those situations in which the *mala fides* of the defendant's act is proven by a preponderance of the evidence. That is, it should be shown that the defendant either intended to deprive the plaintiff of his property or, having knowledge of facts sufficient to put him on notice of the plaintiff's ownership, acted in reckless disregard of the probable consequences.

Accord, Pearce v. G.R. Kirk Co., 92 Wn.2d 869, 873, 602 P.2d 357 (1979); *Bailey v. Hayden*, 65 Wash. 57, 117 Pac. 720 (1911). What the Court was talking about in *Smith v. Shiflitt* and the other cases was not, in fact, punitive damages in the way we think of them today unrelated to any specific measure of loss; rather the Court was making sure

(footnote continued on next page)

imposed punitive damages (which she did not), because she explicitly found that Daniel's conduct was fraudulent, Findings XIX and XXIV, CP 11-12, which has long been held to be equivalent to the intentional bad faith requirement recognized in *Smith v. Shiflitt*.[13]

2. Foreign Stock Option Cases.

In *Greene v. Safeway Stores, Inc.*, the Tenth Circuit recognized the unique interplay between a make-whole remedy and the loss of stock options. 210 F.3d 1237 (10th Cir. 2000). The Plaintiff was forced to exercise his stock options sooner than he planned when his employer fired him in violation of the Age Discrimination in Employment Act. Like tort damages, the purpose of the remedies under the ADEA "is to make a plaintiff whole — to put the plaintiff, as nearly as possible, into the position he or she would have been in absent the discriminatory conduct." 210 F.3d at 1244 (quotation omitted). The fact finder accepted the plaintiff's valuation and awarded the Plaintiff $4.4 million in damages for unrealized appreciation on those options due to the forced early exercise and sale. The Tenth Circuit affirmed in terms consistent with Washington tort damages principles:

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both that the victim was made whole (did "not suffer a loss because of the wrongful taking" in the words of *Brougham*) and the wrongdoer got no benefit from the conversion. *See Fischnaller v. Sussman*, 167 Wash. 367, 9 P.2d 378 (1932).

[13] *See Rozelle v. Vansyckle*, 11 Wash. 79, 84, 39 P. 270 (1895) ("the parol promise upon the part of Vansyckle, and upon which the plaintiff relied, was made in bad faith, and with intent to deceive, and hence amounted to an actual fraud."). *Accord, Sharbono v. Universal Underwriters Ins. Co.*, 139 Wn. App. 383, 410-411, 161 P.3d 406 (2007), *rev. den.*, 163 Wn.2d 1055 (2008) (equating intentional bad faith and fraud); *Phil Schroe Ins. Inc. v. Royal Globe Ins. Co.*, 99 Wn.2d 65, 73, 659 P.2d 509 (1983) (same).

> Failure to compensate [Plaintiff] for his unrealized stock option appreciation would be a failure to return him as nearly as possible to the economic situation he would have enjoyed but for the defendant's illegal conduct. . . In forcing [Plaintiff] to exercise his options earlier that he otherwise would have, [defendant] curtailed [plaintiff]'s right to choose the date on which he would exercise his right to buy stock in order to maximize his profit on the sale of the shares he acquired.

Greene, 210 F.3d at 1244 (quotation omitted) (emphasis added).

Greene demonstrates that tort law's make-whole remedy is well suited to this context when a divorcing spouse converts future property rights he had just agreed belonged to his wife, then lies about it repeatedly to her and the court. There can be no discounting of the wronged spouse's property in such circumstances; she must be made whole.

Similarly, the Southern District of New York explained why the traditional conversion measure of damages (at or within a reasonable time of the conversion) is not adequate for option cases where the plaintiff loses the right to play the market risk free. *Commonwealth Associates v. Palomar Medical Technologies, Inc.*, 982 F. Supp. 205 (S.D.N.Y. 1997).[14] The premise underlying the time limitation of the "highest intermediate value rule" is that an investor, upon learning of the conversion,

> . . . can reenter the market to 'replace' the lost shares. This is certainly true with respect to most shares of stock and also with some futures contracts and other investment vehicles.

Id.,982 F. Supp at 212. In *Commonwealth Associates*, however, the defendant failed to "demonstrate the availability of a market in which the

[14] Although the claim at issue in *Commwealth Associates* was styled as a breach of contract, the Court analyzed damages from a conversion perspective. 982 F. Supp. at 211. *See Scully v. US WATS*, 238 F.3d 497, 511-12 (2001) (noting that *Commonwealth Associates* was not strictly a breach of contract case).

plaintiff might readily have replaced the warrants for which he had contracted." While the plaintiff could have purchased common shares after it became aware of the wrong, "this plainly is not an equivalent security since, unlike the investor in warrants, the purchaser of market shares must assume the full risk of a decline in the market price of the stock. ***The value of the warrants is precisely in their insulation of the investor from such risk, . . .***" *Id.*, 982 F. Supp. at 212 (bold added).

In this case, awarding Teresa the difference between the market price and the options price at a reasonable time after she learned of the wrong would not have allowed her to re-enter the market in the same position she would have been in (insulated from the risk of a decline in the market price of Paccar) because purchasing Paccar common shares after notice of the wrong would have left her fully exposed to the risk of decline. Thus, *Commonwealth Associates* recognized the proof of those damages may not be precise because of the nature of the injury:

> In assessing damages, particularly for lost profits, we recognize the inevitability of some imprecision in the proof, and note that **certainty as to the amount of damages is not required, particularly where it is the defendant's breach that has made such imprecision unavoidable.**

Commonwealth Associates, 982 F. Supp. at 208 (bold added). Judge Churchill recognized that Daniel's action created this problem and he should not benefit from it to Teresa's detriment.

3. Contract damages are not appropriate in a conversion case under *Langham II.*

In contrast to tort damages, contract damages are intended to give

the injured party *the benefit of her bargain*, a measure which may -- or may not -- fully compensate the injured party for all the damage done, which can include lost profits, essentially a make-whole remedy:

> 'One who fails to perform his contract is justly bound to make good for all damages that accrue naturally from the breach; and the other party is entitled to be put in as good a position pecuniarily as he would have been by performance of the contract.'

Rathke v. Roberts, 33 Wn.2d 585, 866, 207 P.2d 716 (1949), quoting *Miller v. Robertson*, 266 U.S. 243, 257 (1924) (citation omitted). But contract damages are limited by foreseeability which, in some cases, may yield less than "make-whole" relief.[15] Some foreign jurisdictions, particularly New York, have used a contract analysis to compute damages for stock option conversion, with understandably lower damage calculations, in part since the "breach of contract damages are to be measured from the date of the breach." *See Lucente v. Int'l Business Machines Corp.*, 310 F.3d 243 (2d Cir. 2002) (contract damages arising from the cancellation of stock options must be limited to the net present value of the stock options as of the date of breach).[16]

Since *Langham II* clearly establishes that conversion of stock

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[15] *E.g.*, "[D]amages recoverable for a breach of contract are those which 'may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from [the] breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.' " *Gaglidari v. Denny's Rests., Inc.*, 117 Wn.2d 426, 446, 815 P.2d 1362 (1991).

[16] *Hermanowski v. Acton*, 580 F.Supp. 140, 145-46 (E.D.N.Y. 1983) (damages caused by breach of contract resulting in loss of stock options determined by measuring the difference between the option price and the market value of the stock on the date of the breach), *aff'd in relevant part*, 729 F.2d 921 (2d Cir. 1984)(*per curiam*).

options in the dissolution context we have here sounds in tort and not contract, these contract-based cases are irrelevant for damages if they do not result in a make-whole remedy for Teresa.

4. Judge Churchill did not speculate in her damages award.

In *Rorvig v. Douglas*, 123 Wn.2d 854, 861, 873 P.2d 492 (1994), this Court affirmed the award of damages where the challenge was to the method of calculating those damages, similar to Daniel's arguments here. In *Rorvig*, as in this case, the challenger "offered no evidence to support an alternate method of calculating damages." Thus, the Court affirmed the trial court's damage award because, as with the Nelson declaration here, the evidence of damages "is sufficient if it affords a reasonable basis for estimating the loss" without subjecting the trier of fact to speculation or conjecture, which is the case here. *Rorvig*, 123 Wn.2d at 861. In April 2007, Judge Churchill accepted Mr. Nelson's projections and net value and the judge did not have to speculate as to the damages when she applied his analysis, and should be affirmed under *Rorvig*.

Judge Churchill was entitled to accept Mr. Nelson's net value. *In re Marriage of Sedlock*, 69 Wn. App. 484, 490-91, 849 P.2d 1243 (1993). An appellate court may not "substitute its judgment for the trial court's" and must affirm if the damage amount is within the range of evidence. *In re Marriage of Rockwell*, 141 Wn. App. 235, 242, 170 P.3d 572 (2007). Unrebutted expert testimony is sufficient to support the value assigned to future losses where, as here, it was accepted by the trial court. *Mayer v. Sto Indus.*, 156 Wn.2d 677, 695, 132 P.3d 115 (2006).

Finally, the ten-year backward review to obtain the future projection for Paccar stock can hardly be faulted as cherry-picking. It included two dramatic drops in the stock market, the "dot.com bust" in 2000 – 2001 and the 9/11 stock market and general economic free-fall. There is no evidence offered by Daniel to suggest that the projection made by Mr. Nelson was inaccurate or an unreasonable estimate over such an extended time and that it is speculation. Indeed, if his argument is accepted, not only would he dramatically profit from his intentional and fraudulent conversion, but no future projections of likely earnings of individuals or companies would be acceptable in court on the simple basis that no one can ever know the future. No plaintiff could prove a case for future losses of any sort. That is nonsense, not the law.

V. CONCLUSION

Teresa Farmer respectfully requests the Court affirm Judge Churchill's judgment and the decision of the Court of Appeals. She also requests her attorney's fees and expenses under the CR2A agreement no matter what the outcome, because none of these proceedings would have been necessary except for Daniel's intentional misconduct and bad faith.

Dated this 29th day of October 2010.

CARNEY BADLEY SPELLMAN, P.S.

By: Gregory M. Miller

Gregory M. Miller, WSBA No. 14459
Counsel for Respondent Teresa Farmer

NO. 83960-3

SUPREME COURT
OF THE STATE OF WASHINGTON

In re the Marriage of: TERESA FARMER, Respondent, vs. DANIEL J. FARMER, Petitioner.	CERTIFICATE OF SERVICE

I declare under penalty of perjury that I caused true and correct copies of respondent's *Revised 20-page Supplemental Brief of Respondent* and this *Certificate of Service* to be served upon counsel of record today as follows:

Douglas A. Saar Law Office of Skinner & Saar PS 740 SE Pioneer Way Oak Harbor, WA 98277-5724 P: (360) 679-1240 F: (360) 679-9131 Email: doug@skinnerlaw.net	☒ U.S. Mail, postage prepaid ☐ Messenger ☐ Fax ☐ Email ☐ Other_____
Catherine Wright Smith Edwards, Sieh, Smith & Goodfriend PS 1109 1st Ave., Ste. #500 Seattle, WA 98101-2988 P: (206) 624-0974 F: (206) 624-0809 Email: cate@washingtonappeals.com	☒ U.S. Mail, postage prepaid ☐ Messenger ☐ Fax ☐ Email ☐ Other_____

Kenneth A. Manni Cohen, Manni, Theune & Manni LLP PO Box 889 Oak Harbor, WA 98277-0889 P: (360) 675-9088 F: (360) 679-6599 Email: c/o Karen@cmtlaw.net	☒ U.S. Mail, postage prepaid ☐ Messenger ☐ Fax ☐ Email ☐ Other_____

DATED this 29th day of October, 2010.

Gregory M. Miller

APPENDICES

APPENDIX A

SUPERIOR COURT OF WASHINGTON
COUNTY OF ISLAND

In re the Marriage of: TERESA FARMER, Petitioner, and DANIEL J. FARMER, Respondent.	NO. 04-3-00086-4 FINDINGS OF FACT, CONCLUSIONS OF LAW

THIS MATTER having come on regularly before the undersigned judge on the Petitioner's motion for the entry of an order for relief from judgment; the petitioner appearing by and through her attorney of record Kenneth A. Manni of Cohen, Manni & Theune; the respondent appearing by and through his attorney of record of Douglas A. Saar, the court having reviewed the records and files herein and the argument of counsel, does hereby make the following findings of fact.

I.

On July 21, 2006, the parties, through their respective counsel entered into a valid CR2A Agreement.

II.

The final decree of dissolution of marriage was entered October 13, 2006, approximately three months after the CR2A Agreement was entered into by and between the parties.

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ORIGINAL

III.

The Decree of Dissolution of Marriage provided for division of all of the parties assets and debts including several thousand PACCAR stock options, a portion of which were awarded to the petitioner wife as her sole and separate property and a portion of which were awarded to the respondent husband as his sole and separate property.

IV.

The final decree of dissolution adopted the CR2A provisions, including, but not limited to paragraph 8 of Exhibit B of the decree of dissolution of marriage which reads in pertinent part as follows:

The wife shall receive one-half of the following community stock options:

Option Date	*Type*	*Granted*	*Price*	*Expiration Date*	*Wife's Share*
4/27/1999	*NQ*	*1,710.00*	*$23.9028*	*4/27/2009*	*855*
1/25/2000	*NQ*	*2,029.0*	*$18.5555*	*1/25/2010*	*1014*
1/24/2001	*NQ*	*1,707.0*	*$22.9445*	*1/24/2011*	*854*
**1/23/2002*	*NQ*	*4027.0*	*$28.2045*	*1/23/2012*	*1510 to wife*
1/15/2003	*NQ*	*3513*	*$31.4000*	*1/15/2013*	*723 to wife*
1/15/2004	*NQ*	*1992.0*	*$56.9533*	*1/15/2014*	*83 to wife*

The wife will direct the husband when she wishes to exercise her options. The wife shall be solely responsible for all costs and taxes associated with exercising her options. The husband must declare the transfer on his tax return and pay taxes on the transfer, the wife shall be responsible for the taxes. The husband shall provide the wife with the information on the taxes on the transfer. If the options are cashed, the husband shall hold back an amount equivalent to the taxes he expects to pay on the transfer. At the time the husband's taxes are filed, he shall provide proof of the actual tax consequences and the wife shall either pay any additional amount owned or receive a refund from the husband if she overpaid. All remaining stock options are the husband's separate property.

V.

Immediately prior to the final hearing on entry of the final orders on October 13, 2006, Petitioner's counsel subpoenaed respondent's bank records and discovered that the respondent had made a deposit of approximately $491,000 into his bank.

VI.

At the time of the hearing before the court on October 12, 2006 when this matter was brought to the court's attention, the respondent, through counsel advised the court that

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the above described funds were derived from the respondent's sale of his share of the PACCAR stock options which were awarded to respondent.

VII.

The court directed the respondent to produce all of the documentation concerning the foregoing transaction within seven (7) days of the October 12, 2006.

VIII.

The respondent failed and refused to comply with the court's directive.

IX.

On December 18, 2006 on motion by the petitioner, the court entered an order on petitioner's motion compelling respondent to produce stock option sale documentation, et al.

X.

Pursuant to the foregoing order, the respondent was directed to produce:

Produce every document, letter, memorandum, etc. regarding the sale of any and all PACCAR stock options. The documents shall be delivered to Petitioner's attorney within seven (7) days of this order.

XI.

The respondent refused to comply with the December 18, 2006 order referred to above.

XII.

On January 29, 2007 on Petitioner's motion, the court entered an order on motion for contempt finding the respondent in contempt as a result of his refusal to comply with the December 18, 2006 order, again ordered the respondent to produce all documentation and further ordered that the respondent shall further pay sanctions in the amount of $100 per day for each day all documentation previously ordered on December 18, 2006 is not delivered to petitioner commencing January 30, 2007.

XIII.

Subsequent to the entry of the decree of dissolution of marriage, on or about October 24, 2006, the respondent filed a motion, together with an affidavit, dated October 24, 2006 wherein the respondent identified and admitted for the first time that the respondent had sold all of the parties' PACCAR stock options, not simply the PACCAR

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stock options which were awarded to him pursuant to the CR2A Agreement as noted in finding of fact No. III above. In the respondent's declaration he admitted that he had sold all of the parties' PACCAR stock options in August of 2006 after the parties had entered into the CR2A Agreement, but prior to the entry of the final decree of dissolution of marriage on October 13, 2006.

XIV.

The respondent had no authority from the petitioner or petitioner's counsel directing him to exercise the stock options which were awarded to the petitioner pursuant to the parties' CR2A Agreement.

XV.

The respondent exercised the stock options on August 14, 2006 deriving from the sale of said stock options the sum of One Million Seventy Thousand Three Hundred One Dollars and 18/100th ($1,070,301.18) $625,636.55 was viewed as a combination as the cost of exercising the stock options and hold back for federal taxes. The remaining $444,664.63 was deposited into the respondent's bank account. Of that amount, the respondent admitted having expended approximately $170,000 for the purchase of real property, leaving a balance of approximately $274,664.63. The options were exercised at $82.476 per share. The respondent received total option income of $729,456.46. 37.5% of the gross proceeds were held back for federal taxes or $273,546.17. In addition, the stock options were also subject to FICA and Medicare which amounts to 1.45% of the total distribution or $10,577.

XVI.

On August 25, 2006, approximately 11 days after all of the stock options were exercised by the respondent, the respondent forwarded an email to the petitioner which read as follows:

Just so you can see the history to help you decide. Are you going to cash out the stock or stock options? You might want to read the documents that were sent to Ken by PACCAR.

XVII.

On September 7, 2006, approximately three weeks after all of the stock options were exercised, the respondent forwarded another email to the petitioner which read as follows:

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As you said early in the separation, we were heavily leveraged with PACCAR stock. It went as high as $88.35 per share and now is back down to about $55. As it was downgraded again today, you might want to consider what to do with your "shares." Read the paperwork about options. Once the divorce is final, option shares are not inheritable for anyone other than my spouse so if anything happened to me, your options would be gone. Or if I was laid off, you would need to sell within 30 days. It is public information that the 2007 emissions regulations will be very tough on truck manufacturers. I think I am going to hold on to the other side of 2008, but the choice is yours. Hold on with the risk, or sell on the way down. Let me know.

XVIII.

On March 20, 2007, the petitioner filed a motion and declaration for relief from judgment pursuant to Washington State Superior Court Rule 60(b)(1)(3)(4). The matter was originally scheduled to be heard on April 2, 2007, but was continued to April 16, 2007 at the request and for the convenience of respondent and respondent's counsel. Petitioner's motion referred to above was heard by the court on April 16, 2007 as was respondent's motion to finalize PACCAR stock, for entry of judgment, to amend decree and for attorney's fees.

XIX.

As a direct and proximate result of the respondent's unauthorized sale of the petitioner's share of the PACCAR stock options, and the respondent's fraudulent conduct, the petitioner has been substantially and irrevocably damaged insofar as she is now unable to exercise the stock options which were awarded to her pursuant to the terms and conditions of the parties' CR2A Agreement and the Decree of Dissolution of Marriage. All of the stock options have been exercised and their exercise is final and irrevocable.

XX.

Had the petitioner been in a position to exercise the stock options on the day before each group of stock options expired, petitioner would have been able to realize approximately $617,553.00 on future exercises dating from April 26, 2009, to January 13, 2013, using an estimated Federal tax rate of 35% plus Medicare of 1.56%. The present value of the $617,553 is $487,325.

XXI.

In support of petitioner's motion, petitioner submitted the declarations of Roland T. Nelson, CPA, CFP, said declarations are dated March 21, 2007 and June 5, 2007.

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XXII.

The respondent did not challenge the findings of Roland T. Nelson by submission of a sworn declaration from any CPA or any similarly qualified professional challenging the assumptions, findings and conclusions of Mr. Nelson.

XXIII.

The court adopts the findings of Roland T. Nelson CPA identified in the document entitled "Declaration of Roland T. Nelson, CPA, CFP", dated March 21, 2007 and the "Supplemental Declaration of Roland T. Nelson, CPA, CFP" dated June 5, 2007, which findings are incorporated by reference herein as if fully set forth herein.

XXIV.

The court finds that the petitioner should be awarded judgment against the respondent as result of the respondent's fraudulent conduct described above. Said judgment should be in the amount of $487,325.

XXV.

The court finds that the respondent's conduct referred to above was fraud, visited not only upon the court but also upon the petitioner insofar as after the respondent sold all of the parties stock options, the respondent made no less than two attempts to persuade the petitioner to authorize the respondent to sell her shares of the stock options in spite of the fact that all of the stock options had already been exercised by the respondent.

XXVI.

Further, the court finds the respondent's conduct fraudulent because when the deposit of approximately $444,000 was identified to the court by petitioner's attorney, the respondent lied to the court in advising the court that those sums represented the sale of only the respondent's share of the stock options when in fact those sums represented the net proceeds available from all of the stock options, both the respondent's and the petitioner's.

XXVII.

The court finds that the respondent committed fraud pursuant to Washington Superior Court Civil Rule (b)(4) and that the petitioner is entitled to relief from the decree of dissolution of marriage based upon that provision.

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XXVIII.

The court finds that the petitioner is entitled to relief from the provision of the decree of dissolution of dissolution of marriage prayed for based on Washington Superior Court Civil Rule 60(b)(1), insofar as the admission that the respondent had sold all of the PACCAR stock on or about October 24, 2006 constituted "surprise" based upon the affirmative representation of the respondent made prior to the entry of the decree of dissolution of marriage.

XXIX.

The court finds that the petitioner is entitled to relief pursuant to Washington Superior Court Civil Rule 60(b)(3) insofar as the discovery that the respondent sold all of the PACCAR stock constituted newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under CR59(b).

XXX.

The court finds that it is fair and reasonable to award the petitioner attorney's fees in the amount of $7750.00 and costs in the amount of $204400.

BASED UPON THE FOREGOING FINDINGS OF FACT, THE COURT ADOPTS THE FOLLOWING CONCLUSIONS OF LAW:

I.

The petitioner is entitled to relief from the portion of the decree of dissolution of marriage which awards to her PACCAR stock options pursuant to Washington Superior Court Rule 60(b)(1): surprise.

II.

The petitioner is entitled to relief from the portion of the decree of dissolution of marriage which awards to her PACCAR stock options pursuant to Washington Superior Court Rule 60(b)(3): newly discovered evidence.

III.

The petitioner is entitled to relief from the portion of the decree of dissolution of marriage which awards to her PACCAR stock options pursuant to Washington Superior Court Rule 60(b)(4), fraud, with a heretofore demoninated extrinsic, misrepresentation; or other misconduct of an adverse party.

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IV.

It is just, fair and equitable to award to the petitioner judgment against the respondent in the sum of $487,325.00, said sum representing the amounts which the petitioner would have realized on future exercises of stock options awarded to her pursuant to the terms and conditions of the decree of dissolution of marriage from April 26, 2009 to January 13, 2013 using an estimated federal tax rate of 35% plus Medicare of 1.56%.

V.

It is just, fair and equitable to award to the petitioner 100% of the funds presently maintained in the trust account of Skinner & Saar PS, or under the direction and control of respondent's attorney, Douglas A. Saar. It is just, fair and equitable for the funds described above to be immediately disbursed by the respondent's attorney to the petitioner, the amount of $120,326.07 shall be disbursed within 10 days of the entry of the order on petitioner's relief from judgment.

VI.

It is just, fair and equitable to award judgment to the petitioner ~~for the balance~~ in the amount of $487,325 ~~minus $_____ or the sum of $_____~~. Said judgment will accrue interest at the rate of 12% per annum from the date of this judgment until paid in full.

VII.

It is just, fair and equitable to award judgment to the petitioner for attorney's fees and costs in the amount of $9794.57 Said judgment shall accrue interest at the rate of 12% per annum from the date of this judgment until paid in full.

DONE IN OPEN COURT this 14 day of April 2008

Dulcie L. Chumbley

JUDGE

Presented by

Kenneth A. Manni, WSBA#9511
Attorney for Petitioner

Approved for Entry, Notice Waived

Douglas Saar, WSBA# 28221
Attorney for Respondent

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APPENDIX B

SUPERIOR COURT OF WASHINGTON
COUNTY OF ISLAND

In re: TERESA FARMER Petitioner, and DANIEL J. FARMER Respondent.	NO. 04-3-00086-4 DECLARATION OF ROLAND T. NELSON, CPA, CFP

PURSUANT TO RCW 9A.72.085, I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT.

Affiant is a a certified public accountant (CPA), licensed in the state of Washington. Affiant is also a certified financial planner. A copy of affiant's curriculum vitae is attached hereto as **Exhibit A** and incorporated by reference as if fully set forth herein.

At the request of counsel for the petitioner, affiant reviewed all of the documents regarding the premature exercise of PACCAR stock options awarded to Teresa Farmer in her divorce from Daniel J. Farmer.

The terms of the stipulated CR2A agreement, dated July 18, 2006 and the decree dated October 13, 2006, provided that Teresa Farmer would determine when her shares of

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Mr. Farmer realized a net, after exercise price and taxes of $444,664. Tax was withheld at 37.5%, plus Medicare tax of 1.45%. It is not possible to determine the correct withholding until a tax return is prepared, so we do not know if the withholding was excessive.

Of the net amount realized, Teresa farmer's share, based on the shares awarded to her is $173,298 (plus any adjustment for over-withholding of federal income tax).

We have computed that over the last 10 years (March 6, 1997 to March 6, 2007) PACCAR had a rate of return of 20.235% per annum. If Ms. Farmer had held her options until the day before expiration, and the rate of return remained consistent, Ms. Farmer would have realized $617,553 on future exercises (dating from April 26, 2009 to January 14, 2013) using an estimated federal tax rate of 35% plus Medicare tax of 1.45%.

Attached hereto as **Exhibit B** and incorporated by reference herein as if fully set forth herein are the schedules and affiant's calculations.

All of the opinions expressed in this declaration are made to a reasonable accounting certainty.

Dated at Bellevue, WA on this ___ day of March 2007

see attached signature

Roland T. Nelson, CPA, CFP

...ALTY OF PERJURY I state that ...
...delivered a copy of this docum... to
...ttorney for Respondent on the
21 day of March, 2007

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Mr. Farmer realized a net, after exercise price and taxes of $444,664. Tax was withheld at 37.5%, plus Medicare tax of 1.45%. It is not possible to determine the correct withholding until a tax return is prepared, so we do not know if the withholding was excessive.

Of the net amount realized, Teresa farmer's share, based on the shares awarded to her is $173,298 (plus any adjustment for over-withholding of federal income tax).

We have computed that over the last 10 years (March 6, 1997 to March 6, 2007) PACCAR had a rate of return of 20.235% per annum. If Ms. Farmer had held her options until the day before expiration, and the rate of return remained consistent, Ms. Farmer would have realized $617,553 on future exercises (dating from April 26, 2009 to January 14, 2013) using an estimated federal tax rate of 35% plus Medicare tax of 1.45%.

Attached hereto as Exhibit B and incorporated by reference herein as if fully set forth herein are the schedules and affiant's calculations.

All of the opinions expressed in this declaration are made to a reasonable accounting certainty.

Dated at Bellevue, WA on this 21st day of March 2007

Roland T. Nelson

Roland T. Nelson, CPA, CFP

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ROLAND T. NELSON, CPA/PFS, CFP

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CURRICULUM VITAE

EDUCATION

St. John's University, New York – BBA (Accounting) 1956
New York University – Graduate Business School – Major Federal Taxation

CURRENT EMPLOYMENT

Principal – Abramson Pendergast & Company, CPA's
President – Nelson & Nelson CPA's, P.S., Seattle, Washington.
Practice limited to

- Litigation support services
- Domestic relations
- Valuation of closely held businesses and professional practices for dissolutions, estate and gift tax returns, S Corporation elections, and purchases and sales of closely held businesses
- Settlement conferences
- Lost wages analyses
- Commercial claims
- Buy-Sell Agreements – valuations
- Present value calculations for defined benefit pension plans
- Stock option and 401(k) plan analyses
- Tracing for separate property issues

PROFESSIONAL AFFILIATIONS

- American Arbitration Association
- American Institute of Certified Public Accountants
- Business Valuation Certificate of Educational Achievement (AICPA)
- Certified Financial Planner – 1988
- Certified Public Accountant – Washington – 1965
- National Association of Certified Valuation Analysts

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Exhibit A

- Personal Financial Specialist (AICPA)
- Washington State Society of CPA's Litigation Services Committee
- Washington State Society of CPA's Advisory Council 2003-2004

SPEECHES ON BUSINESS VALUATION TECHNIQUES AND ISSUES

- American Society of Women Accountants
- East King County Bar Association
- IRS/WSCPA Seminar – Estate and Gift Tax Evaluation
- King County Bar Association – Family Law Institute
- Legal Education Institute, Inc.
- National Association of Personal Financial Advisors, Vancouver, B.C.
- National Business Institute – Business Valuations and Divorce Taxation
- Pierce County Bar Association – Professional Valuations
- Seattle-King County Bar Association
- Seattle University – School of Law
- The National Lawyers Guild
- WSCPA Litigation Services Conferences
- Women Lawyers of Snohomish County

PROFESSIONAL EXPERIENCE

- Nelson & Nelson, CPA's, P.S. (1980 - present)
- Roland T. Nelson, CPA (1975 - 1979)
- Founding partner – Nelson, Eliason, Bennett & Hammack, CPA's (1967 - 1974)
- Controller – Jack A. Benaroya Company (1964 - 1967)
- Peat, Marwick, Mitchell & Co., CPA's, New York

QUALIFIED AS EXPERT WITNESS

- Benton, Franklin, Island, Jefferson, King, Kitsap, Pierce, San Juan and Snohomish counties
- Federal Bankruptcy Court

HONORS AWARD

- Washington State Bar Association – Family Law Section – Professional of the Year Award 2003-2004

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Teresa Farmer and Daniel J. Farmer Dissolution

Estimate of loss to Teresa Farmer due to options being exercised prematurely

Grant Date	Total Number of Options at Dissolution	Awarded To Wife	% To Wife	Wife's 3 for 2 split adjusted	Split Adj. Exercise Price	Selling Price	Net Am Realized share - B
4/27/99	1710	855	50%	1283	$15.9352	54.984	$30,5
1/25/00	2029	1014	50%	1521	12.3703	54.984	39,5
1/24/01	1707	854	50%	1280	15.2963	54.984	30,9
1/23/02	4027	1510	37%	2265	18.8030	54.984	49,2
1/15/03	3513	732	21%	1098	20.9333	54.984	22,9
1/15/04	1992	83	4%	125	37.9700	not sold	0
	14978	5048		7572			$173,
Less not exercised	-1992						
	12986						
Split Adjusted	19477	Total # shares sold by husband on 8/14/2006					

Page 1

Teresa Farmer and Daniel J. Farmer Dissolution

Estimate of loss to Teresa Farmer due to options being exercised prematurely

Grant Date	Wife's 3 for 2 split adj.	Split Adj. Exercise Price	Expiration Date	Projected price at day before Expiration (1)	Gross Selling amount	Exercise Cost	Estimi Tax (
4/27/99	1283	$15.9352	4/27/09	$102.21	$131,135	$20,445	$40,:
1/25/00	1521	12.3703	1/25/10	117.26	178,352	18,815	58,1
1/24/01	1280	15.2963	1/24/11	140.92	180,378	19,579	58,6
1/23/02	2265	18.8030	1/23/12	169.35	383,578	42,589	124,:
1/15/03	1098	20.9333	1/15/13	202.85	222,729	22,985	72,8
1/15/04	125	37.9700	1/15/14	Not sold			
	7572						

(1) Based on projected rate of return of 20.235% per annum from March 6, 2007

(2) 35% Federal Income tax and 1.45% Medicare tax

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SUPERIOR COURT OF WASHINGTON
COUNTY OF ISLAND

In re the Marriage of: TERESA FARMER, Petitioner, and DANIEL J. FARMER, Respondent.	NO. 04-3-00086-4 GR17 AFFIDAVIT RE: Declaration of Roland T. Nelson, CPA, CFP

Affidavit of facsimile pursuant to GR 17:

Pursuant to RCW 9A.72.085, I certify under penalty of perjury under the laws of the state of Washington that the following is true and correct.

I, Karen Y. Jacobs, am secretary for Kenneth A. Manni who is the attorney of record for Teresa Farmer, petitioner herein. I received the foregoing document from Roland T. Nelson by facsimile. I further declare that prior to signing this affidavit, I did examine the document, determined that it consisted of 7 pages, including this affidavit page, and that the document was complete and legible.

SIGNED at Oak Harbor, Washington this 21 day of March, 2007

Karen Jacobs

Karen Y. Jacobs
Post Office Box 889
Oak Harbor, Washington 98277
Telephone: 360-675-9088
Facsimile: 360-679-6599

APPENDIX C

FILED

JUN 08 2007

SHARON FRANZEN
ISLAND COUNTY CLERK

SUPERIOR COURT OF WASHINGTON
COUNTY OF ISLAND

In re: TERESA FARMER Petitioner, and DANIEL J. FARMER Respondent.	NO. 04-3-00086-4 SUPPLEMENTAL DECLARATION OF ROLAND T. NELSON, CPA, CFP

PURSUANT TO RCW 9A.72.085, I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT.

Affiant is a certified public accountant (CPA), licensed in the state of Washington. Affiant is also a certified financial planner.

I have previously provided this court with a sworn declaration concerning the calculation of the net after tax loss suffered by Ms. Teresa Farmer. My prior declaration concerning the calculation of that loss is dated March 21, 2007.

I have been requested to calculate the present value of the future net after tax loss suffered by Ms. Teresa Farmer. I have calculated the present value utilizing a 6% per annum discount figure to determine the present value of the future net after tax loss suffered by the petitioner.

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C-1

The following is the schedule for the calculation. The net present value of the future $617,553 loss has been determined to be $487,325.

Expiration Date	Present Value Date	Future Net After Tax	May 10, 2007 Present Value
4/27/2009	5/10/2007	$70,344	$62,723
1/25/2010	5/10/2007	$101,386	$86,535
1/24/2011	5/10/2007	$102,187	$82,294
1/23/2012	5/10/2007	$216,698	$164,662
1/15/2013	5/10/2007	$126,938	$91,111
Totals:		$617,553	$487,325

Dated at Bellevue, WA on this 5 day of June 2007

see attached signature

Roland T. Nelson, CPA, CFP

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Oak Harbor, Washington 98277
Phone: (360) 675-9088, Fax: (360) 679-6599

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The following is the schedule for the calculation. The net present value of the future $617,553 loss has been determined to be $487,325.

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1/15/2013	5/10/2007	$126,938	$91,111
Totals		$617,553	$487,325

Dated at Bellevue, WA on this 5th day of June 2007

Roland T. Nelson

Roland T. Nelson, CPA, CFP

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SUPERIOR COURT OF WASHINGTON
COUNTY OF ISLAND

In re the Marriage of: TERESA FARMER Petitioner, and DANIEL J. FARMER Respondent.	NO. 04-3-00086-4 GR 17 DECLARATION Document: Declaration of Roland T. Nelson, CPA, CFP

Affidavit of facsimile pursuant to GR 17:

Pursuant to RCW 9A.72.085, I certify under penalty of perjury under the laws of the state of Washington that the following is true and correct.

I, Karen Y. Jacobs, am secretary for Kenneth A. Manni who is the attorney of record for Teresa Farmer, petitioner. I received the Declaration of Roland T. Nelson, CPA, CFP by facsimile. I further declare that prior to signing this declaration, I did examine the document, determined that it consisted of 3 pages, including this declaration page, and that the document was complete and legible.

SIGNED at Oak Harbor, Washington this 5 day of June 2007.

Karen Y. Jacobs
Post Office Box 889
Oak Harbor, Washington 98277
Telephone: 360-675-9088
Facsimile: 360-679-6599

UNDER PENALTY OF PERJURY I state that (mailed/faxed/delivered) a copy of this document to attorney for Respondent on the 7 day of June, 2007

GR 17 Declaration- Page 1

APPENDIX D

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FILED

APR 1 4 2008

SHARON FRANZEN
ISLAND COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR ISLAND COUNTY

In the Matter of the Marriage of TERESA FARMER, Petitioner, and DANIEL J. FARMER, Respondent.	NO. 04-3-00086-4 DECLARATION OF ROLAND T. NELSON, CPA, CFP

PURSUANT TO RCW 9A.72.085, I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT.

Affiant is a certified public accountant (CPA), licensed in the state of Washington. Affiant is also a certified financial planner.

I have previously provided this court with a sworn declaration concerning the calculation of net after tax loss suffered by Ms. Teresa Farmer. My prior declaration concerning the calculation of that loss is dated March 21, 2007. In that declaration I identified the value of Ms. Farmer's loss to be $617,553.

I have also previously provided the court with a sworn declaration concerning the present value of the future net after tax loss suffered by Ms. Teresa Farmer. That declaration is dated June 5, 2007.

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ORIGINAL

In that declaration I identified the present value using a 6% per annum discount figure to determine the present value of net after tax loss suffered by the petitioner to be $487,325.

I have reviewed the June 29, 2007 report of Steven J. Kessler Re: Net Present Value of Stock Options. I am mindful that on September 10, 2007 the court entered an order striking portions of the report of Steven J. Kessler including the following:

1. All of the exhibits identified on page 1.
2. All of the section entitled "Critique of Roland Nelson Damage Analysis" contained on page 2 and page 3.
3. All of the section entitled "Mitigation of Damages" contained on page 4.
4. Each of the exhibits identified as Exhibit I through Exhibit VIII which were attached to Mr. Kessler's report.

The only sections which the court retained in the Kessler report were the following:

1. Page 1 identifying Mr. Kessler's background, the documents he reviewed and significant facts
2. Page 1 "Information Relied On" through page 2 with the words "My findings are as follows"
3. Page 3 and 4, "Critique of Roland Nelson Present Value Analysis"
4. Page 5 "Conclusion"

The purpose of this declaration is to provide the court with a reply to that portion of the Kessler report identified as follows:

Critique of Roland Nelson Present Value Analysis [contained on pages 3, 4 of Kessler report]

By way of background, the court identified in the September 10, 2007 oral ruling on petitioner's motion to strike portions of the Kessler report, the following:

> *I am striking the critique in the declaration of Mr. Kessler. I am striking the entire paragraph or paragraphs on Critique of Roland Nelson, Damage Analysis...I am leaving in the Critique of Roland Nelson, Present Value Analysis, which is what I asked for.*
>
> *The concern I had was that there would be a present value calculation and that it really depended on the discount rate that was used and I allowed that additional information. I did not allow any other additional information because the time had passed for that.*

Mr. Kessler states the following in connection with his critique of my present value analysis:

> *I disagree with his use of a 6% discount rate...In this case, I do not believe any investor would accept a 6% discount rate for a stock investment. [emphasis added]*

The information upon which Mr. Kessler relies for this conclusion all relates to factors which are not

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pertinent to this case:

> *The discount rates typically apply to different types of companies show significant changes[emphasis added]*
>
> *Startups*
> *Early startups*
> *Late startups*
> *Mature companies*
>
> *Beta: the measurement of how a company's stock price reacts to a change in the market.[emphasis added]*
>
> *In the case of a stock investment such as PACCAR there are several risks to consider.*
>
> *There is market risk as the overall stock market could decline or even collapse.*
>
> *There is a specific risk because PACCAR could fail to be competitive.*
>
> *I personally believe there is significant risk in the market.*
>
> *I do not believe any investor would accept a 6% discount rate for a stock investment.*

In the final analysis, Mr. Kessler utterly and entirely misses the point. The point is, that the court has already determined the financial loss of the petitioner to be $617,553. The loss will ultimately be expressed in the form of a judgment, having a guaranteed rate of return by statute. A judgment is not a "stock investment". A judgment is not subject to "market risk". A judgment is not subject to "market decline". A judgment is not an investment in any type of company (startup, early startup, late startup, or mature company). A judgment is not subject to reduced marketability, limited number of investors willing to invest, high risks or optimistic forecasts by enthusiastic founders. A judgment is simply a fixed number established by the court which bears a fixed interest established by statute. There is no risk, there is no company. There is no market analysis. A court judgment is the functional equivalent of a certificate of deposit. Interestingly, Mr. Kessler acknowledges:

> *Today in the case of a CD a 6% discount may be appropriate...*

Virtually all of Mr. Kessler's "critique" of my analysis of a 6% discount rate is based upon Mr. Kessler's attempt to attack the damage analysis. The issues he raises have nothing whatsoever to do with present value analysis because a judgment is not an investment in stock. However, his criticisms have everything to do with an attack on the damage analysis. The court has already ruled on the

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measure of damages and accordingly all of Mr. Kessler's critique of my discount rate analysis is incorrect.

In virtually every case that I am associated with, pensions and all other things of this type, the court always accepts a 6% discount rate back to a present cash number and again the theory is that if you had that amount of dollars you could invest them and with safety get a 6% yield and that would bring you up in the future to the judgment number. I have provided expert testimony in connection with this matter for a number of years, typically in connection with pensions. I typically testify between 20 – 30 times a year on pensions. A pension is a future "sum certain". For instance, when a retiree hits 65 he is going to get $1,000 a month for lifetime. If he is going to receive $1,000 for his life, what is the present value? We always use a 6% discount rate. Mr. Kessler uses the same 6% discount in that type of case when he has a sum certain in the future. I have been involved in many cases where Mr. Kessler has either used or has agreed that a 6% discount rate is appropriate in connection with ascertaining present value of a "sum certain". In point of fact, Mr. Kessler and I dominate the present value calculations for defined benefit pensions in the Seattle market. I personally do over 400 pensions a year, defined benefit, present value calculations, and every one, without exception, is at a 6% discount. Everyone that I have seen that Mr. Kessler has done has been at a 6% discount. There are exceptions, for instance under President Carter when the prime rate was 14% we were not using a 6% discount because you could buy a 5 year CD and get 13%. That is no longer the case and has not been the case for many years. Statistically, over the last 5 – 6 years I can advise the court with certainty that I have used 6% present value discount rate when I have a sum certain and I am bringing that back to a sum today to establish present value.

In connection with the affidavit which I provided to the court dated June 5, 2007, the discount was calculated by using an analysis of the expiration date for the various stock options. The earliest being April 27, 2009 and the latest January 15, 2003. Each of those needed to be determined separately because of the difference in the expiration date of the options. Starting with the future net after tax value of each of those groups of stock options, I applied the appropriate discount rate (6%) to arrive at the present value as of May 10, 2007. Those 5 values were aggregated to arrive at the overall present value of the $617,553 loss to be $487,325. I certify under penalty of perjury that that is the net present value as of May 10, 2007 of the $617,553 loss sustained by the petitioner.

Even Mr. Kessler's calculations with regard to the entirely unsupported discount rates that he uses (between 15% and 25%) are incorrect. He states.

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I provide the court with Mr. Nelson's calculated loss of $487,325 using various discount rates as follows: (emphasis added.)

Even this calculation is wrong. The calculated loss is not $487,325. The "calculated loss" is $617,553. It appears that what Mr. Kessler did is to take the discounted loss of $487,325 and then apply his various discount rates between 15 and 25 percent to my present value which was already discounted using a 6% discount rate. The analysis is entirely incorrect.

In summary, Mr. Kessler's critique of my present analysis entirely misses the mark. The court's determination of the petitioner's loss in the amount of $617,553 is not a stock investment, an investment in a company, subject to risks for reduced marketability, or limited numbers, nor is it subject to market risks or risks because PACCAR could fail to be competitive. None of these apply to the sum certain calculation for loss which is the functional equivalent of a certificate of deposit. The court's judgment is not subject to any of the factors identified by Mr. Kessler. Mr. Kessler's critique is simply a backdoor attempt to attack the damage calculation. The 6% discount rate is used and has been used for many years in connection with "sum certain" assets. A 6% discount rate is applicable here.

Finally, Mr. Kessler has incorrectly calculated the discount by discounting the $487,325 figure used in my June 5, 2007 declaration which in fact is the discounted value of the $617,553 loss. Mr. Kessler has in effect discounted my present value analysis which is already discounted from the $617,553 loss.

Dated: April 10, 2008

Roland T. Nelson, CPA, CFP

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR ISLAND COUNTY

In re the Marriage of:	
TERESA FARMER	NO. 04-3-00086-4
Petitioner,	Gr17 Affidavit Re: Declaration of Roland T. Nelson, CPA, CFP
and	
DANIEL FARMER	
Respondent.	

Affidavit of facsimile pursuant to GR 17:

Pursuant to RCW 9A.72.085, I certify under penalty of perjury under the laws of the state of Washington that the following is true and correct.

I, Judy L. Sheridan, am secretary for Kenneth A. Manni who is the attorney of record for Teresa Farmer, petitioner. I received the foregoing document from Roland T. Nelson the above named declarant by facsimile. I further declare that prior to signing this affidavit, I did examine the document, determined that it consisted of 5 pages, including this affidavit page, and that the document was complete and legible.

SIGNED at Oak Harbor, Washington this 10th day of April 2008

PENALTY OF PERJURY I state that I mailed/faxed/delivered a copy of this document to attorney for RESPONDENT on the 10 day of APRIL, 20 08

Judy L. Sheridan
Post Office Box 889
Oak Harbor, Washington 98277
Telephone: 360-675-9088
Facsimile: 360-679-6599

DEC- 1

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APPENDIX E

Excerpt of hearing on October 12, 2006 – Farmer – Farmer

In Re The Marriage of Farmer, 04-3-00086-4

Judge: The court set this hearing to see if we could resolve some of the dissolution matters. I have received a memorandum from Mr. Manni and have reviewed that, as well as all of the information that was attached. Do you wish to say anything at this point? I know that Mr. Manni is requesting further time to determine further the deposit into the Premier account (or Bank of America, whatever) has any community funds, or that has anything to do with ..should we continue this?

McPherson: I don't believe there is any need to continue it, under the CR2A there is specific provisions if this happens so if there one issue on one account that needs to be resolved at a later date, then I would certainly say let's resolve that one issue at a later date, but I believe ...

Judge: Mr. Manni, go ahead.

Manni: The court can see this is a substantial problem as far as we are concerned, we have indicated repeatedly that there have been problems with disclosure of financial information and bank records. In the previous declarations, we have provided the court with copies of the request for production of documents and follow up letters and each time we come to court we are blamed for not acknowledging the yeoman's efforts made by Mr. Farmer to scrupulously supply all of these documents, yet we see here after having ourselves gone out and subpoenaed Bank of America documents from the same financial institution which incidentally maintains the Farmer Children's Trust, we find that $491,000 has been deposited into Mr. Farmer's account. We don't believe that that is a small or insignificant issue and we would like to have an opportunity to determine what that distribution came from. There was also a $180,000 expenditure that went out. These are significant issues that should have been disclosed by Mr. Farmer and were not.

McPherson. This is not something new. When we settled the agreement in July, we had a settlement agreement and Mr. Manni and I had a discussion about exercising stock options and gave the parties the opportunity to exercise the stock options because there was going to be a split in stock and **Mr. Manni was well aware that my client was looking into exercising some of his options that he would be awarded and that is where that money came from.** It came after we had a division of property, after we had an agreement and after I had had a discussion with Mr. Manni regarding that. So this isn't something new. He didn't receive $400,000 of income or anything else and they are aware of that. They are simply asking for delay. I don't know why they want a delay, but ...repeatedly supplied...they are not in the best of form because they were broken down to get ready for trial. I also have the .....

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Exhibit A

Judge Churchill: On the other issues, Mr. Manni, is that it?

Manni: The only other aspect your honor that we have identified is the business involving the $491,000 that showed up in Mr. Farmer's bank account and we ask the court for an opportunity to investigate that to determine whether it represents income or separate property or perhaps even community property. We don't know the answer to that.

McPherson: Mr. Farmer is here--you want to ask him now?...

Judge: Do you wish to place him under oath?

Manni: No I wish to get the documentation from the bank to find out exactly what happened.

Judge: o.k.

McPherson: Your honor, we would ask that the court conclude this matter. Obviously they are trying to drag it out for some reason.

Judge: I think I can conclude some of the matters. And I am going to do so.

.....

Judge: And I am not putting any non-modifiable language in there that would have to have been in the CR2 agreement, but the percentage stays the same, however, because of the health insurance there is some change in that amount--- it changes somewhat. As to the tax exemptions, there is an extraordinary amount of child support being paid here and I am going to award two of the tax exemptions, the two older children to the dad and the youngest exemption, the youngest child to the mother. I think it is better not to get into the moving around of these exemptions. That means that the mother will have one exemption longer than you will Mr. Farmer, but that is just the way it is going to be. I would also put something in there that provide that he is current on his child support obligations.

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As to the family home, the argument is that the CMA valued the family home at $685,000—but there is a certified appraisal done on February 2006 which is valid for six months at $600,000 value. I am going to value the house at $600,000 value. It is a certified appraisal. The CMAs –are a dream figure—not necessarily the amount you would actually get if you sell the house so I find that the certified appraisal, especially since it is valid for six months seems to be more credible than a CMA which is usually done for purposes of getting you to list your house with someone.

As to the North Carolina property. It was appraised for $43,500. You are asking the court to decide if North Carolina is like the state of Washington, the conditions are the same for property, I can't do that. All I can say is this is what the appraisal was $43,500.

The SIP account value, I believe, –the wife gets 55% of the community part of the SIP account and I find that the amount that he put in after separation are his own separate contributions so therefore the court will accept the values provided by Ms. McPherson.

The IRAs, I believe you have both included—Mr. Manni has included those IRAs in his list of assets—Mr. Farmer's IRA was $4,616.76. Mrs. Farmer's was $5,531.46. So I am not going to argue about that. The fact that they weren't disclosed or didn't know about them—now they are disclosed—now we know about them.

The Penn Mutual Insurance. Mr. Farmer had that since 1984, four years prior to the marriage, there is a law, I believe it is under penalty of perjury, but in any event there is a letter from Penn Mutual that there hasn't been any deposits since 1984 so that is his separate property.

The 2005 tax, I have already indicated that the father will be able to claim two exemptions and the mother will be able to claim one.

Mr. Farmer will disclose under penalty of perjury the money that was deposited in the Premier account and also provide supporting documentation for that and that doesn't mean that Mr. Manni on behalf of Mrs. Farmer can't find out on his own, but I do want that to be provided to the court.

Mr Manni. Do we have a time frame on that?

Judge: Let me think, what would be reasonable here to get that information?

McPherson: About a week.

Judge: Alright, in a week.

APPENDIX F

Not Reported in P.3d, 116 Wash.App. 1067, 2003 WL 21055463 (Wash.App. Div. 1)
(Cite as: 2003 WL 21055463 (Wash.App. Div. 1))

NOTE: UNPUBLISHED OPINION, SEE RCWA 2.06.040

Court of Appeals of Washington, Division 1.
In re the Marriage of Margo R. LANGHAM, f/k/a Kolde, Respondent,
v.
Velle J. KOLDE, Appellant.
No. 49974-2-1.

May 12, 2003.

Appeal from Superior Court of King County.
Roberta Ellen Doyle, Attorney at Law, Seattle, WA, Charles Kenneth Wiggins, Attorney at Law, Bainbridge Island, WA, for Appellant.

Jerry Richard Kimball, Attorney at Law, Patricia S. Novotny, Attorney at Law, Cynthia B. Whitaker, Attorney at Law, Seattle, WA, for Respondent.

UNPUBLISHED OPINION

BAKER, J.

*1 Velle Kolde and Margo Langham each claimed that they owned certain stock options held by Kolde following their marriage dissolution. After Kolde exercised these options and later sold them, Langham requested that he exercise them for her. Kolde appeals a decision awarding Langham the value of the options and prejudgment interest. We conclude that Kolde improperly exercised the options and later sold the shares of stock. But the court's measurement of damages was inaccurate because Kolde converted the options when he sold the shares of stock, not when he exercised the options. And the court should not have included in the judgment taxes that Langham would later have to reimburse to Kolde. We accordingly remand to recalculate damages in light of our ruling.

I

Velle Kolde and Margo Langham were married more than five years before separating in 1993. They later dissolved their marriage in December 1994. Several months prior to the final dissolution decree, the court entered a temporary order requiring the parties to liquidate Microsoft stock options to satisfy some of their mounting debts. This sale, in April 1994, netted proceeds of $32,577.24 after taxes.[FN1] Kolde deposited $32,500 of these funds into a trust account with Langham's attorney. Her attorney used a portion of these funds to pay both parties' attorney fees and a counselor hired for their children. Her attorney periodically dispersed the remainder of these funds to pay the mortgage on the family home where Langham continued to reside.

FN1. Kolde sold 1,535 options grossing $52,062 before taxes.

In the final dissolution decree, the court divided assets equally. Langham was awarded the house, one car, trust funds, and a tax refund. The court awarded Kolde their 401K fund and other personal assets. To equalize the property division, Kolde was owed an equalizing payment of $27,754. But after taking into account a $55,000 premarital debt owed by Kolde, the court awarded Langham a net compensating payment of $32,082. Because the bulk of the couple's marital assets were vested and unvested Microsoft stock options, the court made this amount payable to her by the exercise and sale of stock options.

The court then divided the remaining options equally between Kolde and Langham. The dissolution decree stated that Langham was awarded half of all vested and unvested stock options remaining after an award to her from the sale of some vested options:

Microsoft stock options ... which options have vested as of November 1, 1994, in a number equal to the following: 50% of the options remaining after the award to wife of $32,082 (net of taxes which taxes shall be paid by husband). Net proceeds and sale procedure shall be accomplished as described herein.

...

50% of the Microsoft stock options which vest fol-

Not Reported in P.3d, 116 Wash.App. 1067, 2003 WL 21055463 (Wash.App. Div. 1)
(Cite as: 2003 WL 21055463 (Wash.App. Div. 1))

lowing November 1, 1994.

...

The April sale (netting $32,500) was not mentioned in the dissolution decree.

Because the options were not transferable, they were left under Kolde's control. If Langham wished to exercise or sell her options, she was required to notify Kolde, who would then exercise the requested number. Because the options were in Kolde's name, upon exercise he withheld and paid taxes and was to be reimbursed at a rate determined by the court. Calculating the shares remaining for each party after the compensating payment should have been simple. But stock splits, taxes, and subsequent sales complicated the accounting. In 1997, following this court's decision affirming the decree, the parties attempted to reconcile the totals. Kolde and Langham exchanged numerous letters attempting to arrive at an exact figure. At the same time the attorneys negotiated over taxes and daycare expenses in dispute. At the heart of the accounting controversy was whether the April 1994 option exercise should be apportioned based on benefit, or equally. In November 1997, the parties reached a tentative agreement on the stock distribution that allocated most of the April 1994 sale to Langham.

*2 Langham's attorney sent an unsigned copy of a stipulation, which Kolde's attorney signed. Ten days later, Langham's attorney again sent a stipulation on the option distribution, this time signed. But in the cover letter to the stipulation by Langham's attorney, she expressed that this stipulation was contingent on resolving child care expenses and taxes:

As you and I have discussed in some detail, these matters must be settled at the same time. My client is tired of responding to multiple motions, and the parties should be able to bring closure at least to these financial affairs. The judgment cannot be filed or the check cashed without resolution of the outstanding income tax issue.

In her response letter, Kolde's attorney questioned the need to tie all the issues together:
The Stipulation Establishing Petitioner's Ownership of Microsoft Stock Options is correct and agreed. I have signed it. I would assert that it should be filed with the court and that there is no authority nor good reason to withhold your consent to having this correct and completed document finalized by filing. Please reconsider the validity of your position that you are withholding consent to finalization of a correct and valid Stipulation in order to get some leverage in another matter which is only related to the subject matter of the Stipulation by the fact that it involves the same parties.

The parties did not reach any further agreements on how many stock options each party had remaining.

In October 1998, Langham's attorney sent Kolde's attorney a letter revoking any purported agreement on the options. In the letter, she explained that '{a}lthough a stipulation was signed by {Langham's other attorney} there were a number of outstanding conditions which were apparently never met .... This stipulation is explicitly revoked.' She said that she would prepare a new stipulation and send it to Kolde, but none was ever sent. Beginning in late July 1999, Kolde began exercising all of the remaining options.[FN2]

FN2. Kolde exercised 3,500 options on July 30, 1999, 2,500 options on August 4, 1999, and 3,435 options on February 22, 2000.

In March 2001, Langham requested that Kolde exercise all of the options she claimed to own. Kolde responded that she owned far fewer options, based on his claim that a binding agreement had been reached in 1997, and that he had exercised those options and later sold the shares. Eventually, a court commissioner concluded that Kolde had wrongfully exercised 7,859 of Langham's options. After an unsuccessful motion to revise, this appeal followed.

II

Generally, our standard of review in dissolution cases is for abuse of discretion.[FN3] '{T}rial court decisions in dissolution proceedings will seldom be changed on appeal.' [FN4] One challenging such decisions must show a manifest abuse of discretion by the trial court.[FN5] And a trial court only abuses its discretion 'if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons.' [FN6]

FN3. *In re Marriage of Stenshoel*, 72

Not Reported in P.3d, 116 Wash.App. 1067, 2003 WL 21055463 (Wash.App. Div. 1)
(Cite as: 2003 WL 21055463 (Wash.App. Div. 1))

Wn.App. 800, 803, 866 P.2d 635 (1993).

FN4. *In re Marriage of Griffin*, 114 Wn.2d 772, 776, 791 P.2d 519 (1990).

FN5. *Griffin*, 114 Wn.2d at 776.

FN6. *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997).

But Kolde argues that we should employ a de novo standard of review because the commissioner entered the judgment without testimony or exhibits. As support, he cites to *In re Parentage of Hilborn*,[FN7] a recent Division III opinion which states that '{w}e review de novo if the commissioner's decision is based entirely on documentary evidence.'[FN8] As support for this proposition, the Hilborn court cited to *In re Marriage of Balcom*.[FN9] But in Balcom, the court did not discuss the standard of review that the appellate court would apply. Instead, it examined the standard of review for the superior court to use in reviewing a commissioner's decision.[FN10] We decline to follow Hilborn.

FN7. 114 Wn.App. 275, 58 P.3d 905 (2002).

FN8. *Hilborn*, 114 Wn.App. at 278.

FN9. 101 Wn.App. 56, 1 P.3d 1174 (2000).

FN10. *Balcom*, 101 Wn.App. at 59.

*3 Kolde argues that the precise division of assets was unclear in the dissolution decree. He claims that 'Judge Mertel's Decree of Dissolution required some accounting in order to determine exactly how many Microsoft options were awarded to Margo.' Because Kolde paid the taxes due, there might be discrepancies between the taxes he paid and the amount actually due. He argues that this created confusion as to the number of options that Langham was awarded.

But the decree is clear in its distribution of assets. The dissolution decree stated that Langham was awarded half of all vested and unvested stock options remaining after an award to her from the sale of some vested options:

> Microsoft stock {which} have vested as of November 1, 1994, in a number equal to the following: 50% of the options remaining after the award to wife of $32,082 (net of taxes which taxes shall be paid by husband). Net proceeds and sale procedure shall be accomplished as described herein.
>
> ...
>
> 50% of the Microsoft stock options which vest following November 1, 1994.
>
> ...

This language clearly requires that the options be evenly split after selling options to provide Langham with $32,082, net of taxes. The decree does not mention the April 1994 option exercise. Kolde argues that because there was an accounting required by the decree, that option exercise could be revisited. But there is no indication in the decree that any tax adjustments or payments would adjust the number of options owned by each party.

Civil Rule 2A (CR 2A) agreements require a stipulation in open court on the record, or a writing acknowledged by the party to be bound.[FN11] The party moving to enforce a settlement agreement has the burden of proving that there is no genuine dispute regarding the agreement's existence and material terms.[FN12]

FN11. *Lavigne v. Green*, 106 Wn.App. 12, 17, 23 P.3d 515 (2001).

FN12. *In re Marriage of Ferree*, 71 Wn.App. 35, 41, 856 P.2d 706 (1993).

Here, the purported 1997 stipulation provided that 82 percent of the $32,557 in stock options sold prior to the dissolution decree would be charged to Langham's remaining options. But in the cover letter to the stipulation, Langham's attorney expressed that this stipulation was contingent, and Kolde's attorney acknowledged Langham's position in a response letter. The trial court found that there was no CR 2A agreement, and we agree.

The trial court found that Kolde converted Langham's stock options when he exercised them, and calculated damages based on the value of the stocks at the time of exercise.

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Washington courts have defined conversion as "the act of willfully interfering with any chattel, without lawful justification, whereby any person entitled thereto is deprived of the possession of it." [FN12] Although Langham could not exercise the options herself, she did have a recognizable interest in them. [FN14] Accordingly, she could bring an action against Kolde for converting her options.

FN13. *Judkins v. Sadler-MacNeil*, 61 Wn.2d 1, 3, 376 P.2d 837 (1962) (quoting W. Stallybrass, Salmond on Torts sec. 78, at 310 (9th ed.1936)).

FN14. Under the Restatement (Second) of Torts sec. 243, a person with a future interest may also bring an action for conversion: One who is subject to liability for conversion to a person in possession of a chattel, or to one entitled to its immediate possession, is also subject to liability to a person entitled to the future possession of the chattel for harm caused to such person's interest in it. Restatement (Second) of Torts sec. 243 (1986); see also W. Page Keeton, et al., Prosser and Keeton on Torts 15 (5th ed.1984).

Kolde argues that the court should not have awarded Langham the value of the stock at the time he exercised the options. Instead, he argues that Langham should be awarded the market value of the stock at the time she later asked him to exercise the options. But damages for conversion of stock is usually measured by the value of the stock as of the date of the wrongful transfer or refusal to transfer. [FN15] And in the case of fluctuating values, the measure of value may be even higher. [FN16]

FN15. *Frisch v. Victor Indus., Inc.*, 51 Wn. App 377, 381, 753 P.2d 1000 (1988).

FN16. *Brougham v. Swarva*, 34 Wn.App. 68, 75-76, 661 P.2d 138 (1983) (holding that in willful conversion the measure of damages for converting coins of fluctuating value was the highest market value of the property within a reasonable time after the conversion).

*4 To maintain a conversion action, a plaintiff need only establish some property interest in the goods allegedly converted, and does not need to be in possession or have the immediate right to possess the property. [FN17]

FN17. *Meyers Way Dev. Ltd. P'ship v. University Sav. Bank*, 80 Wn.App. 655, 675, 910 P.2d 1308 (1996).

Nevertheless, a conversion can only occur when a plaintiff is deprived of the right to possess that property. [FN18] Here, Kolde did not convert the shares when he exercised the options, because this act did not affect Langham's right to possess the property. Instead, he converted her property when he sold the stocks. But the trial court awarded damages based on the higher value when he exercised the options, not when the stock was later sold.

FN18. *Meyers Way Dev.*, 80 Wn.App. at 675.

If the award were based on principles of equity, it would still be incorrect. Family law courts function as courts of equity. But the measure of damages applied by the court below bore no relation to what Kolde actually received. Because he did not sell the stocks when he exercised the options, Kolde did not realize the profits imputed to him by the trial court. Instead, the award must be based on the value of the stock when Kolde sold it.

We remand for a determination of damages based on the value of the stocks at the time that Kolde sold the stock, not when he exercised the options. Kolde also argues that Langham's claim was barred by laches, and that she cannot bring her claim because she unreasonably delayed in bringing a motion before the family law court. Laches is an equitable defense based on estoppel and only bars a cause of action if: (1) the plaintiff was aware or should have been aware of the facts constituting the cause of action; (2) commencement of the action was unreasonably delayed; and (3) the defendant is damaged by the delay. [FN19]

FN19. *Hilborn*, 114 Wn.App. at 278.

Because Langham delayed almost four years from the 'stipulation,' and three years from the purported revocation, Kolde argues that it is inequitable for a court

to award her the value of the option, when he exercised them. And because Kolde borrowed money to exercise the options, he suffered by her delay in claiming ownership to the options.

Essentially, Kolde claims that he relied on the purported stipulation, and that Langham should have known that he would rely on the stipulation. But he confuses who has the duty here.

First, the decree clearly awarded her the stock options at issue, and nothing altered her ownership. Kolde does not explain why Langham should have been aware that he was exercising her options. Kolde was required to hold her options until she instructed him to exercise them. In fact, had Kolde reasonably believed the options were his, in contravention of the original dissolution decree, he should have moved the court to enter the purported CR 2A agreement. But he did not.

After discovering that Kolde had exercised her options and later sold the stock, Langham timely brought this action for conversion. Kolde cannot show that Langham unreasonably delayed in bringing her claim.

The trial court's order also requires that Kolde amend his tax returns to report option income consistent with the decree of dissolution, and requires him to indemnify Langham from any adverse taxes resulting from his failure to comply with tax filing requirements in the decree. Kolde argues that either laches or equitable estoppel bars this part of the order because he filed the 1997 and 1998 returns as Langham requested. But the order does not specify that he amend any returns. Instead, it requires that he comply with the decree and adjust his returns to take into account the September 2001 judgment. Presumably, this was to take into account that he exercised options in 1999 and 2000 that were not his. Because Kolde has failed to show that there was an abuse of discretion as to this requirement, we affirm.[FN20]

FN20. See *In re Marriage of Capetillo*, 85 Wn.App. 311, 316, 932 P.2d 691 (1997) (standard of review for modification proceedings is for an abuse of discretion).

*5 Although the dissolution decree requires Kolde to withhold 31 percent as taxes from any exercise of options, this amount only serves as a benchmark. If the actual tax amount exceeds 31 percent, the decree requires Langham to reimburse Kolde for the difference within 30 days of the computation. It is possible that the court may have improperly failed to account for taxes in excess of 31 percent that Kolde paid. If this is the case, then this amount, along with its prejudgment interest, should be deducted from the ultimate amount awarded.[FN21] We remand this issue to the trial court to determine what the actual tax amount is, and to deduct this from the judgment awarded to Langham.

FN21. It is unclear from the evidence whether the court's calculations are correct.

The decree clearly divided the options equally after crediting Langham for $32,082. There was no enforceable CR 2A stipulation altering the number of options each party owned. We direct that the decision be modified by changing the valuation date for determination of damages to when Kolde sold the stock. Finally, the judgment should not include taxes that Langham will later have to reimburse to Kolde.

REVERSED in part, AFFIRMED in part.

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